QUEEN'S BENCH,
APPEAL SIDE.

JOHN GRAINGER ET AL.,

Appellants,

AND

G. H. PARKE,

Respondent.

FACTUM OF THE RESPONDENT.

Filed 29 February 1860

PROVINCE OF CANADA,
LOWER CANADA, to wit:

QUEEN'S BENCH,

APPEAL SIDE.

JOHN GRAINGER, et al.,

APPELLANTS,

AND

GEORGE HOLMES PARKE,

RESPONDENT.

CASE OF THE RESPONDENT.

The present appeal has been instituted by the Plaintiffs in the Court below, from a judgment of the Superior Court at Quebec, rendered on the 5th day of November, 1859, by which the action of the Plaintiffs was dismissed on a demurrer or *défense en droit*, to the declaration.

The case in the Court below, was an action of assumpsit brought to recover the sum of £20,000, for the balance alledged to be due for advances upon the building of ships, made by the firm of David Grainger & Son of Belfast, in Ireland, to the Defendant in Canada, by means of letters of Credit upon the firm of H. & J. Johnston & Co., Bankers in London in England, where the Defendant's Bills of Exchange were accepted and paid, on the credit so obtained, and which advances were to be repaid by the proceeds of the sale of the ships of the Defendant, in Belfast. The whole transaction and cause of action arose, therefore, in the United Kingdom, and would be controlled by the laws of that country.

On the 20th of July 1858, David Grainger died, at Dublin in Ireland, and subsequently, the surviving partner John Grainger, and Maria Belinda Grainger, in her quality of executrix of the last will of David Grainger, brought in the Superior Court at Quebec, the joint action upon the causes of action above stated, which is the subject of the present proceedings. By their declaration it is alleged that the Plaintiffs reside in Ireland, that the said Maria Belinda Grainger, obtained probate of the will of David Grainger at Belfast, and the declaration proceeding upon the causes of action above mentioned, concludes for a condemnation against the Defendant.

The defects put in issue by the *défense en droit*, are,—that it appearing that the quality of executrix claimed by one of the Plaintiffs accrued to her under the laws of a foreign country, it is not alleged what is the law of that country, in relation to her rights as such executrix, nor the effect of such foreign law in vesting such executrix with the estate or rights of action of the testator, or what are her rights under such foreign law, or her capacity to bring the action which is the subject of this appeal; that the Plaintiff Maria Belinda Grainger, in such quality could not bring the action in question, and that she could not join the co-Plaintiff in bringing the same.

These views were maintained by the Court below.

The Respondent relies upon the following propositions of law as applicable to this case. 1. That the United Kingdom in common with all other countries beyond the limits of Canada, is to be regarded as a foreign country, in so far as relates to its internal municipal laws. 2. That the Courts of Canada cannot take cognizance of such foreign municipal law. 3. That such foreign law must be made known to the Courts here, by pleading the same as a substantive allegation of fact.

There is a wide difference between rights acquired by contract and those conferred by an office, itself the creation of law, and having none but by particular law. The character of executor as of an administrator and the rights and duties of the office are regulated, in each country, by positive laws which may and do differ in different systems of law, and it is impossible for the Court here to assume what the law of any Foreign Country may be.

The Court here, may as an accident, be acquainted with the law of England or of France, on this subject, but is not judicially and necessarily so, and that knowledge would not in fact exist, with reference to some countries such as Russia or India, with which we might be placed in relations similar to those arising in this case. And although it is beyond the enquiry necessary to this case, if the law of England be referred to on the present subject, it will be found that actually, the executor could not have brought this action in Ireland, which rests in its entirety in the surviving partner, and that the executrix Maria Grainger, is claiming to exercise in Canada, rights which she has not in the Country of her appointment, when by express enactment of our Legislature, her rights in Canada are only co-extensive with those she could exercise there, and in the absence of that statute she would be without any capacity whatever to sue in Canada.

As regards the defendant he has a manifest interest in being informed of the nature of the rights of the Plaintiff in this respect, in order that he may if necessary raise issue upon them and in order to be satisfied that he may not be exposed to a second claim from those in whom the right may really lie. The Statute 22. Vic. ch. 6. places the positions of the Respondent in the clearest possible light. It enacts that Foreign Executors who by the law of the Foreign Country may be seized of the estate of deceased shall have the same rights in Lower Canada, as in such foreign country. This enactment conclusively makes it necessary to show, the seizin of the estate and of the particular rights of the executor by the law of the Country where they were acquired, and the transmission by operation of that law, of the rights of action of the testators' succession to his executor, if such rights of action exist in the executor, and in this case they do not. It is to be remarked also in support of the position that the United Kingdom is to be treated as a Foreign Country that the statute quoted places Upper Canada itself in that category.

The Respondent also claims affirmance of the judgement appealed from, and the dismissal of the action in the Court below on the ground of misjoinder of the Plaintiffs, inasmuch as upon the hypothesis of the executrix being vested with the estate of the testator, the interest of the surviving partner and of the executrix, are several, are susceptible of different defences to each, and as in the case of heirs, the right to a specific sum of money and the right of action became divided, and vested separately in each. In Lower Canada where the rule that *l'intérêt est la mésure des actions* prevails, this joinder the Respondent contends cannot be made, while the practice in England would equally prevent joinder in the case.

The foregoing reasons appear to the Respondent conclusive as supporting the judgment of the Court below, for the affirmance of which he prays.

ANDERSON & PARKIN.

Attorney for Respondent.